IN THE HIGH COURT OF DELHI

RSA.No.173/2007

Shri G.L.Didwania ..... Appellant.
! through: Mr.Harish Malhotra, Senior Advocate with Mr.Rakesh Kumar Saingh, Advocate

VERSUS

$ Minoo K.Bhagwagar ..... Respondent
^ through : Respondent in person.

RESERVED ON : 10.12.2007

% DATE OF DECISION: 12.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Appellant has suffered a dismissal of the suit as well as the first appeal. This is notwithstanding the fact that the respondent was ex-parte at the trial. In the second appeal I am to answer the following question of law:-

> "Whether merely because the testimony of PW-1 remained unchallenged is appellant entitled to a decree in light of Ex.PW-1/1, PW-1/2 and PW-1/3?"

2. The courts below have held against the

appellant/plaintiff with reference to the three documents proved by the plaintiff himself being Ex.Pw-1/1, PW-1/2 and PW-1/3.

3. Appellant sued to recover Rs.2,81,386/- alleging that he had advanced Rs.11 lacs to the respondent and that pertaining to Rs.10 lacs advanced by cheques and a bank draft he i.e. the respondent had executed promissory notes. That in respect of Rs.1 lac advanced in cash no promissory note was issued. That he had filed a suit under Order XXXVII for recovery of Rs.10 lacs together with interest in respect whereof promissory notes were executed and was suing in the suit to recover Rs.1 lac. That since rate of interest agreed was 3% per month he was entitled to Rs.1,81,386.25 towards interest @ 3% per month.

4. Since respondent was ex-parte he did not file a written statement. Appellant's testimony in harmony with the plaint remained unrebutted.

5. However, Ex.PW-1/2 and PW-1/3 proved by the plaintiff/appellant became his death knell.

6. The said two documents are letters on the letter head of Engineering Consultants Pvt.Ltd. of which respondent is the Executive Director. The two have been signed by the respondent. The two letters read as under :-

Ref.No:ECPL/MKB/GLD-01 27th August,2002

Shri G.L.Didwania,
173, Western Avenue,
Sainik Farms,
Khanpur,
New Delhi-110062.

BY REGISTERED POST AD
BY SPECIAL MESSENGER

Dear Sir,

We refer to the "*bridging*" term deposit totalling the Indian Rupee equivalent of USD 20,000/- (US Dollars Twenty Thousand only) – namely Rs.10,00,000/- (Rupees ten lakhs only) which we were privileged to receive from you - vide the following cheques issued by you to us on 23rd March,2001:

(i) Cheque No.051816 dated 23rd March,2001 for the sum of Rs.6,00,000/- (Rupees six lakhs only) drawn on Bank of India, Nehru Place Branch, New Delhi.

(ii) Cheque No.036566 dated 23rd March,2001 for the sum of Rs.3,00,000/- (Rupees three lakhs only) drawn on Indian Bank, Kashmere Gate Branch, New Delhi.

(iii) Demand draft No.036566 dated 23rd March,2001 for the sum of Rs.1,00,000/- (Rupees one lakh only) drawn on Bank of India, Nehru Place Branch, New Delhi.

(iv) Apart from the above, we also do confirm receipt of a cash payment of Rs.1,00,000/- (Rupees one lakh only).

2. While we are thankful to you for having graciously accepted our offer to serve you with the management of your financial term deposits in such a manner so as to yield interest at the rate of 36% per annum with monthly rests (in stark contrast to your earlier rapidly dwindling investments in IT Mutual Funds for equivalent amount with meagre annual interest income), we are also equally grateful to you, for having extended the tenure of the term

deposit to beyond 22nd March,2002 in view of the suspension of all international “bulk commodities” trading in steel bilets due to the global downslide in as a result of the 9/11 factor, and compounded by the problems faced by us on the MSRDC Projects in Mumbai since September,2001 and consequent to the debacle of Enron's Power Protect at Dabhol that has caused a loss of over Rs.5,000/- crores to the Government of Maharashtra and the cash flow crunch faced by MSRDC consequent thereof. (Refer news item by Ms. Sucheta Dalal in the Indian Express of 23rd July,2002, a copy of which had already been made available to you).

In this connection, and despite the above mentioned cash crunch consequent to the financial distress in MSRDC, and contractual hurdles in NHAI (who collectively owe us well over Rs.27.00 lakhs as on date), we confirm having handed over during the financial year ended March,2001, interest totalling Rs.2,10,000/- (Rupees two lakhs ten thousand only), in cash as explicitly desired by you, and we await from you your formal receipt for the like amount as well as your PAN No; so as to enable us to credit the TDS against such interest income accrued by you into the Treasury as per our statutory obligations as well as either to claim reimbursement of such interest charges from MSRDC and/or deductions as “expenses” against business income under the IT laws, all as advised.

An immediate action in the above matter will be much appreciated.

2. Please note that, pending receipt of the PAN details and formal receipt of the sum of Rs.2,10,000/- (Rupees two lakhs ten thousand only) already paid to you in cash, all as explicitly desired by you, we have as mentioned during discussions, specifically insisted, as per expert advice tendered, that all future payments will, from our side, be made only by cheque or demand draft, and not in cash, to avoid further complications in the future re: tax evasion (or complicity) by either side.

However, during subsequent discussions, it is

observed that you, Sir, would now prefer to treat the above sums as “interest-free” loan rather than as “interest bearing” term deposit renewable on an annual basis and with monthly rests.

Kindly do clarify per return your final decision.

We do trust that the aboved represents a true and factual record of our recent discussions in the matter.

Awaiting an early reply, we remain,

Yours faithfully,
per pro ENGINEERING CONSULTANTS PRIVATE LTD.,

sd/-
(MINOO K.BHAGWAGAR)
Executive Director

Copy to : Mr.Hemant Didwania,
Managing Director,
Indian Compressors Ltd.,
33, Okhla Industrial Estate,
New Delhi-110020

x x x x x

Ref.No:ECPL/MKB/GLD-03 2nd June, 2003

Shri G.L.Didwania,
173, Western Avenue,
Sainik Farms,
Khanpur,
New Delhi-110062.

BY REGISTERED POST AD
BY SPECIAL MESSENGER

Dear Sir,

We refer to our discussions of 1st instant in connection with the “*bridging*” term deposit totalling the Indian Rupee equivalent of USD 20,000/- (US Dollars Twenty Thousand only) – namely Rs.10,00,000/- (Rupees ten lakhs only) which we were privileged to receive from you - vide the following cheques issued by you to us on 23rd March,2001:

(i) Cheque No.051816 dated 23rd March,2001 for the sum of Rs.6,00,000/- (Rupees six lakhs only) drawn on Bank of India, Nehru Place Branch, New Delhi.

(ii) Cheque No.036566 dated 23rd March,2001 for the sum of Rs.3,00,000/- (Rupees three lakhs only) drawn on Indian Bank, Kashmere Gate Branch, New Delhi.

(iii) Demand draft No.036566 dated 23rd March,2001 for the sum of Rs.1,00,000/- (Rupees one lakh only) drawn on Bank of India, Nehru Place Branch, New Delhi.

NB: Apart from the above, we also do confirm receipt of a cash payment of Rs.1,00,000/- (Rupees one lakh only).

Your remarks that "your patience is fast wearing out" is noted. It is not clear in what context the same has been made.

It is, therefore, with reluctance that we seek to draw your attention to our earlier letters dated 27th August,2002 and 29th August,2002 respectively as well as to draw your immediate attention to the facts reproduced herein – all of which are still "valid" and begging attention at your end.

Incidentally, although we are in a position to liquidate the entire "outstanding dues" promptly, we seek your assistance in compliance, at your end, of the various statutory obligations as mentioned all along, prior to further action from our end.

2. We also hereby formally acknowledge receipt from you on 21st August,2002 of a State of Accounts showing, inter alia, the interest paid by us to date, and also, your perceptions of the amount purported to be due to you – namely, on the basis of "compounding" of interest on a monthly basis, on the original term deposit or "bridging loan" of Rs.10,00,000/- (as the case may be). (Refer Annexure 'A' to earlier letter of 29th August,002).

We also confirm having received from you certain additional financial instruments/documents (DPN, Receipt etc. etc.) on which you desire us to affix our signatures in token of the additional interest burden payable to you by us, etc.

While we emphatically and categorically deny the net total amount payable to you as contained in your Statement of Accounts dated 21st August,2002, it is noted, that as per your own such Statement of Accounts, you do also confirm having already received from us during AY 2002-2003, a sum of Rs.2,10,000/- (Rupees Two Lakhs Ten Thousand only) as interest payment (namely, income from other sources).

Please also be informed that, as per advice tendered,

(a) we are no longer in a position to continue to release the interest payments in cash, much as we would like to, and/or as desired/insisted upon by you in view of the recent amendments (since 1-6-01) in the IT Laws, of which we are hitherto ignorant but, having been enlightened, can no longer afford to violate.

(b) Likewise, every person from whom tax has been or sought to be deducted under Chapter XVIIB, shall intimate to the person responsible for deducting such tax under that Chapter.

Accordingly, please also note that, as per advice tendered, till such time as you arrange to furnish us your PAN Details and the Income Tax Ward (or Circle) No: in Delhi where your Income Tax assessment takes place, and/or until the receipt by us of a formal "certificate of payment" for all sums paid by us for the Year ended 31st March 2002 – or the same duly regularised by depositing the necessary TDS in the Government Treasury for the FY 2002-2003 - we stand relieved of the burden of paying interest during such interim period(s), and/or to with-hold all further interest payments to you.

3. Your specific attention is also drawn to the

provisions of Section 269T of the IT Act whereby repayment of loan or deposit together with or without interest (or where interest along exceeding Rs.20,000/-) are to be made by either an account payee cheque or by an account payee bank draft. In case of non-compliance with this provision, a penalty equal to the amount of the loan or deposit (as the case may be) so repaid will be leviable under Section 271E of the IT ACT.

Keeping the above in mind we seek your instructions, or otherwise, to deposit, as per the provisions of the IT Act, a sum of Rs.52,872/- immediately in the Government Treasury as TDS on the interest accrued and paid to you during the AY 2002-2003 against the term deposit/loan, as the case may be. Additionally, a sum of Rs.2,10,000/- (Rupees Two Lakhs Ten Thousand only) has, as per advice, been set aside as a provision for further contingencies as per the provisions of Section 271E of the IT Act.

4. With specific reference to the telephonic discussions that you had yesterday evening with the undersigned, when you expressed a desire to consult your advocate (subsequent to the receipt of our letter dated 27th August 2002), we have been instructed to take this opportunity to present to you a draft of the "Certificate of Payment" for *approval by you Advocate on a priority basis,* and we do trust that you will be kind enough to favour us with a "Certificate of Payment" (which is long overdue) in respect of all payments received by you from us during the Financial Year ended 31st March 2002- all in accordance with prevailing statutory requirements and, provisionally, as per the interest payment amounts recorded in the Statement of Accounts received from you on 21st August 2002:

"***CERTIFICATE OF PAYMENT"***

This is to certify that I, Mr.GL Didwania, do hereby, in my individual capacity and/or @ as the Chairman of Indian Compressors Limited (delete as applicable), confirm having <u>received from M/s. Engineering Consultants Pvt. Ltd. (acting through</u>

Mr.Minoo K. Bhagwagar, its Executive Director) having its Registered office at F-14/15 Connaught Place, New Delhi-110 001, a total sum of Rs.2,10,000-(Rupees Two Lakhs Ten Thousand only) during the Financial Year ended 31st March 2002, as interim interest at the rate of 36%(thirty six percent) per annum with monthly rests on the initial loan/term deposit of Rs.10,00,000/-(Rupees Ten Lakhs only) paid on 23rd March 2001.

This is further to certify that I am resident of 173 Western Avenue, Khanpur, New Delhi-110 062 @ and/or as Chiarman of Indian Compressors Limited, out business is situate at 33 Okhla Industrial Estate Phase III, New Delhi 20, and that I/we am/are assessed by the Income Tax Ward no: _____ in New Delhi and have a PAN (Permanent Account Number) as _____/

@ Delete whichever is applicable

Signature/Seal (as applicable)"

5. Incidentally, with reference to your Statement of Accounts received by us on 21st August 2002 (refer Annexure "A" of out letter under reference,) please note that all payments made to you by way of "interest" during the Financial Year ended 31st March 2002, have been invariably effected by us only through cheques drawn *either* in your favour *or* on "Kashmere Gate Charitable Trust", (as the case may be) but encashed always on your behalf and authority and instructions, in cash.

Accordingly, although our records reveal a payment to you of a sum of Rs.1,60,000/- (Rupees One Lakh Sixty Thousand only) drawn through cheque no: 704936 on ICICI Bank, New Delhi, and encashed as per bearer (as per your own instructions to us) on 14th August 2001, we find that the same is not reflected in your Statement of Accounts which had earlier been handed over to us by you. And so, for the time being, limited the issue of interest burden in

the FY for 2002-2003 to only Rs.2,10,000/- (Rupees Two Lakhs Ten Thousand only) as indicated by you in your own Statement of Accounts.

(A copy of the cheque issued in your favour is enclosed herewith as an Annexure "B" to earlier letter dated 29th August 2002).

This needs to be immediately reconciled especially as our records do confirm that we have discharged fully our obligations for payment of interest to you for the Financial Year ended 31st March 2002 and 2003 respectively.

6. May we, in the above connection, draw your pointed attention to the following:

(a) Please note that, since the initial payment received by us on 23rd March 2001 were all paid by cheque, we are not in a position to continue to release the interest payments in cash, much as we would like to, and/or as desired/insisted upon by you.

(b) Had we not advised you to disinvest your assets (as existing in March 2001) in from mutual funds, your assets of Rs.10,00,000/- would have ruefully shrunk to a mere Rs.3,50,000/- or thereabouts, due to the sharp decline in IT fundamentals.

(c) The interest rate of 36% per annum that we are committed to offer is an attractive return for the investment in relation to all other legitimate form of investments and/or without any shrinking of the principal investment.

However, during subsequent discussions on 27th August 2002, it is observed that you, Sir, would not prefer to treat the above sums as "interest-free" loan rather than as "interest baring" term deposit renewable on an annual basis and with monthly rests.

Kindly do clarify per return your final decision.

7. We do trust that the above represents a true and factual record of our recent discussions in the matter.

Needless to state, although we do concede that the above issues are highly embarrassing for either party, we assure you, Sir, of our fullest confidentiality in the matter and do trust that you too will reciprocate likewise.

In view of the above assurance for confidentiality, and confidence in an amicable resolution of the tax liability problems to mutual satisfaction, we trust that you will not choose to take the matter further to various extra-constitutional forum (as was the case on the 27th August,2002) in which case, we shall be left with no alternative but to take whatever steps we may be advised to safeguard our interests and reputation.

During subsequent discussions, you have, suggested that the loan be made “interest free”.

In any case, we seek your immediate action in favouring us with the necessary certificates of payments and similar confirmation of all payments received by you from us to date – all as per the draft furnished above.

Assuring you, Sir, of our fullest co-operation, we remain.

Yours faithfully,
per pro ENGINEERING CONSULTANTS PRIVATE LTD.,

sd/-
(MINOO K.BHAGWAGAR)
Executive Director

ENCL: Annexure “A”: True copy of Statement of Accounts received by us on 21st August,2002 from Mr.GL.Didwania (On record).

Copy to : Mr.Hemant Didwania,
Managing Director,

Indian Compressors Ltd.,
33, Okhla Industrial Estate,
New Delhi-110020

7. I ignore Ex.PW-1/1 for the reason it is a letter addressed by the appellant to the respondent.

8. Both courts below have construed the acknowledgment contained in Ex.PW-1/2 and Ex.PW-1/3 as binding on Engineering Consultants Pvt.Ltd. and not the respondent in his personal capacity.

9. Indeed, I concur with the conclusion drawn by both the courts below with reference to Ex.PW-1/2.

10. The language of the two letters is important. The writer of the letter refers : "*we refer to the bridging term deposit*".

11. This expression is inappropriate in a personal loan.

12. But, what is relevant is that the letter has clearly stated to be written by the Engineering Consultants Pvt.Ltd. through the respondent. This evident from the concluding part of both letters which reads as under:-

Yours faithfully,
per pro ENGINEERING CONSULTANTS PRIVATE LTD.,

sd/-
(MINOO K.BHAGWAGAR)
Executive Director

13. On the plea urged by the learned counsel for the appellant that since testimony of the appellant remained

unrebutted the impugned judgment and decrees are liable to be set aside, suffice would it be to note that under the proviso to Order 8 Rule 5(1) CPC notwithstanding a fact not denied by the opposite party a court may still require the plaintiff to prove the same. The same is mirrored even in the proviso to Section 58 of the Indian Evidence Act,1872.

14. Be that as it may, it is within the domain of the courts below to have considered the impact of Ex.PW-1/2 and PW-1/3 on the unrebutted testimony of the appellant.

15. In my opinion, the view taken by the courts below conforms to the principles of evaluation of oral and documentary evidence. The certificate referred to in Ex.PW-1/3 which is issued by the appellant itself concludes that the loan was taken by M/s. Engineering Consultants Pvt. Ltd. The certificate issued by the appellant reads as under:-

"***CERTIFICATE OF PAYMENT"***

This is to certify that I, Mr.GL Didwania, do hereby, in my individual capacity and/or @ as the Chairman of Indian Compressors Limited (delete as applicable), confirm having received from M/s. Engineering Consultants Pvt. Ltd. (acting through Mr.Minoo K. Bhagwagar, its Executive Director) having its Registered office at F-14/15 Connaught Place, New Delhi-110 001, a total sum of Rs.2,10,000-(Rupees Two Lakhs Ten Thousand only) during the Financial Year ended 31st March 2002, as interim interest at the rate of 36%(thirty six percent) per annum with monthly rests

on the initial loan/term deposit of Rs.10,00,000/-(Rupees Ten Lakhs only) paid on 23rd March 2001.

This is further to certify that I am resident of 173 Western Avenue, Khanpur, New Delhi-110 062 @ and/or as Chiarman of Indian Compressors Limited, out business is situate at 33 Okhla Industrial Estate Phase III, New Delhi 20, and that I/we am/are assessed by the Income Tax Ward no: _____ in New Delhi and have a PAN (Permanent Account Number) as _____/"

16. A last submission made by counsel for the appellant is to be considered. It was urged that pertaining to sum of Rs.10 lacs, reference whereof has been made in Ex.PW-1/2, suit filed by the appellant against the respondent was decreed and in appeal the respondent agreed to pay the said sum of Rs.10 lacs but at a reduced rate of interest and hence said judgment and decree binds the respondent.

17. I note that the respondent suffered an ex-parte decree. The decree was under Order XXXVII CPC. In appeal being RFA(OS) No.36/07 a compromise was arrived at.

18. The respondent explains that having suffered a decree he entered into a compromise but the same cannot bind him in another proceedings.

19. I agree with the respondent for the reason the decree referred to by learned counsel for the appellant against the respondent is an ex-parte decree. The same was not

based on consideration of Ex.PW-1/2 and PW-1/3. The decree was based on promissory notes executed by the respondent.

20. I note that pertaining to Rs.1 lac forming subject matter of the suit, the respondent did not execute any promissory note nor executed any personal guarantee nor stood as surety for respondent.

21. I find no merits in the appeal.

22. The appeal is dismissed.

23. No costs.

24. LCR be returned.

December 12, 2007 PRADEEP NANDRAJOG, J.
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